THE BASIS OF LIS PENDENS. — One who acquires any interest in property involved in litigation, *pendente lite* and from a party litigant, is ordinarily bound by the result of the action, even though he was no party thereto and was not heard therein.[1] Both the rule and the general requisites for the application of it are well settled. Thus there can be no *lis pendens* where there is no property which may be affected by the judgment,[2] or where the property is of such character that it is against public policy to apply the rule, — as with negotiable instruments taken before maturity.[3] The *lis* must, moreover, be perfected,[4] the property adequately described,[5] and the action closely prosecuted in good faith.[6]

Yet the basis of the rule is involved in controversy. One line of authority speaks of it as an equitable doctrine bottomed on constructive notice;[7] the other insists that it is based on the principle of *res judicata*,[8] which is common alike to law and equity. The requisites for a *lis* do not, however, establish either view conclusively, especially since the doctrine is not a favorite with the courts. It may well be urged that, where any requisite is lacking, a purchaser of the property for value and without actual notice should not be held to have constructive notice of the *lis* so as to be bound by it. It may equally be argued that the principle of *res judicata* is not under such circumstances applicable to him. Yet once beyond the fundamentals, the difference in theory may often produce a wide difference in results. Thus the property is affected only by the results of the action in question, and not by collateral claims not litigated therein, even though these be clearly set forth.[8] By the better rule, also, the courts of a sister state, where the property has been carried and sold *pendente lite*, should effectuate the *lis* under the "full faith and credit" clause of the Constitution.[9] Clearly neither of these results — and they are but instances — can be explained on the theory of notice, though perfectly consistent with the doctrine of *res judicata*. The rule, therefore, appears to be founded on judicial necessity. If a party, by alienation of the property in controversy during suit, could render recovery by the plaintiff vain, not only would great injustice be done the plaintiff, but there would be an endless series of actions founded upon the same right in the same property. This is manifestly against public policy.

Yet, because the rule is often harsh in operation, those who invoke it should be held strictly to its requirements. This tendency is illustrated by a recent case which held, in foreclosure proceedings, that while a *lis pendens* as against one taking under the defendant dates from the commencement of the action, a cross-bill seeking affirmative relief creates a *lis*, as to one taking under the plaintiff, only from the moment of filing. *Bridger* v. *Exchange Bank*, 56 S. E. Rep. 97 (Ga.). If it be conceded that the cross-bill is in the nature of a separate suit, — and this seems to be the better

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1 Thompson *v.* Baker, 141 U. S. 648; Mellen *v.* Moline, etc., Iron Works, 131 U. S. 352.

2 St. Joseph Mfg. Co. *v.* Daggett, 84 Ill. 556; Dovey's Appeal, 97 Pa. St. 153.

3 Warren *v.* Marcy, 97 U. S. 96.

4 Allison *v.* Drake, 145 Ill. 501; Williamson *v.* Williams, 11 Lea (Tenn.) 355.

5 Miller *v.* Sherry, 2 Wall. (U. S.) 237.

6 Mann *v.* Roberts, 11 Lea (Tenn.) 57; Sorrell *v.* Carpenter, 2 P. Wms. 482.

7 Wortley *v.* Birkhead, 2 Ves. Sr. 571; Murray *v.* Ballou, 1 Johns. Ch. (N. Y.) 566.

8 Bellamy *v.* Sabine, 1 De G. & J. 566; Geishaker *v.* Pancoast, 57 N. J. Eq. 60.

9 Fletcher *v.* Ferrel, 9 Dana (Ky.) 372. *Contra*, Shelton *v.* Johnson, 4 Sneed (Tenn.) 672.

view,[10] — the result attained by the court obviously follows from the *res judicata* theory. A man cannot be bound by the judgment in a suit not yet begun. The same result follows from a strict application of the notice theory, to which the court leaned. But if a broad view of notice be taken, the very existence of the original suit might well be enough to put the purchaser on inquiry and hence bring him within the judgment on the cross-bill. But such a result seems neither just nor desirable.

THE CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL. — Publicity seems to have been an incident of the common law trial by jury,[1] and hence a constitutional guaranty of trial by jury might well have been construed as a guaranty that the trial should be public. However, very generally our constitutions expressly stipulate that one accused of crime shall be accorded a public trial. The opportunities offered for discovering new testimony, the wholesome effect on witnesses, jurors, and officers of the court, and, running through all, the confidence of the community that it knows or can learn what the courts are doing, have been obvious advantages of allowing the public free access to the trial rooms.[2] On the other hand, such publicity permits spectators to subject themselves to the influences of obscene and vicious testimony.[3] The latter consideration has led to a conflict between the necessity of observing the constitutional limitation and the desire to guard the public morals. More or less complete exclusion of spectators during the recital of obscene testimony has been sustained on the ground that it was necessary to preserve order,[4] to prevent embarrassment of the witness,[5] or to maintain the dignity of the court.[6] But the dignity and decorum of the court proceeding must not be more highly regarded than an express constitutional provision. Nor have summary proceedings for contempt proved entirely inadequate to maintain order.[7] It is evident that the principal object in sustaining such exclusion was to protect the public morals. The courts looked rather at the benefit to the persons excluded than at those necessities of the trial to assure which the constitutional provision was aimed. The current of authority at first seemed to allow practical exclusion,[8] but a recent Ohio decision, holding illegal a conviction on a trial from which all were excluded except the necessary parties to the trial, members of the bar, and newspaper men, marks a trend of authority[9] the other way. *State* v. *Hensley*, 79 N. E. Rep. 462.

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[10] Mansur, etc., Co. *v.* Beer, 19 Tex. Civ. App. 311. See 2 Pomeroy, Eq. Jurisp., § 634. *Contra*, Hall Lumber Co. *v.* Gustin, 54 Mich. 624.

[1] Daubney *v.* Cooper, 10 B. & C. 237. See Lilburne's Trial, 4 How. St. Tr. 1273; Fortescue, De Laudibus Legum Angliæ, Amos' ed., 100; 3 Bl. Comm. 373.

[2] See 3 Wig., Ev., §§ 1834–1836; 6 Works of Bentham, Bowring's ed., 351.

[3] See Cooley, Const. Lim., 7 ed., 441; Beale, Crim. Plead. and Prac., § 257.

[4] Lide *v.* State, 133 Ala. 43, 63.

[5] Grimmett *v.* State, 22 Tex. App. 36.

[6] People *v.* Kerrigan, 73 Cal. 222.

[7] See 2 Bishop, Crim. Law, 8 ed., § 252.

[8] State *v.* Brooks, 92 Mo. 542; Grimmett *v.* State, *supra*; People *v.* Kerrigan, *supra*; State *v.* Callahan, 110 N. W. Rep. 342 (Minn.).

[9] People *v.* Murray, 89 Mich. 276; People *v.* Hartman, 103 Cal. 242 (but *cf.* People *v.* Tarbox, 115 Cal. 57); People *v.* Yeager, 113 Mich. 228. See Peadon *v.* State, 46 Fla. 124, 128.